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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

KENNETH GILBERT, Plaintiff and Appellant, v. CITY OF SALINAS, et al., Defendants and Respondents.	H022128 (Monterey County Super. Ct. No. M41782)

Plaintiff, Kenneth Gilbert claimed that he was injured by police officers executing a search warrant at his residence. Trial was bifurcated and the jury rendered a special verdict following the liability phase in which it found that the defendant, City of Salinas (City) was negligent, but that the four named police officers were not. Because the issue of the City's liability had gone to the jury on a theory of respondeat superior, the jury's findings were not consistent. The plaintiff and the City each filed motions for judgment notwithstanding verdict (JNOV) before proceeding on the issue of damages. The trial court granted the defense motion, and entered judgment for all defendants.

Plaintiff appeals the judgment, contending: 1) the trial court had no power to hear defendant's JNOV motion before all issues were decided; 2) the trial court erred in excluding evidence of misrepresentations made in connection with the search warrant; and 3) the trial court erred in granting defendant's motion for JNOV because the jury's verdict was not inconsistent. We will affirm.

FACTUAL BACKGROUND[1]

Plaintiff had suffered a back injury on the job years ago. He had undergone several back surgeries over the years, his most recent having taken place in May 1997. On October 21, 1997, plaintiff was sitting in his living room eating a sandwich when a team of police officers burst through his front door. The next thing he knew, the officer whom he later identified as defendant Maiorana, and possibly one other, picked him up and threw him over the coffee table. Plaintiff landed on the rug, face down. Even though plaintiff did not resist, and was fully cooperative, Officer Maiorana placed his boot in plaintiff's back and a gun to his head and restrained him in that position for 10 to 15 minutes. Plaintiff cried out and pleaded with Officer Maiorana to let him up, explaining about his back, but Officer Maiorana just told him to shut up. Two officers briefly assisted in restraining the plaintiff after he was down. Plaintiff did not identify these two officers, but he did say that their conduct did not injure him.

The officers had come to plaintiff's home to execute a search warrant. The warrant sought firearms that the police claimed were owned by the adult son of plaintiff's companion, Shirley Kline. Ms. Kline, who arrived home after the search was in progress, also pleaded with the officers to get off the plaintiff's back. In response, one of them told her they would let him up just as soon as she showed them where the guns were hidden.

PROCEDURAL BACKGROUND

Plaintiff sued 15 individual police officers, the Salinas Police Department, two department divisions, and the City of Salinas. His verified complaint contained a single cause of action for negligence, and alleged that he was injured when he was "thrown violently to the hard floor by one of the raiding party and kept down with a forceful knee

[1] The evidence was in marked conflict. Since this is plaintiff's appeal from a JNOV in favor of the defendant, we recite the facts in the light most favorable to the plaintiff.

and foot to his back." The Police Department and the divisions were dismissed following demurrer. Plaintiff's written discovery revealed that one of the 15 individual defendants had not been present at the search. The matter proceeded against the 14 individuals who had been present and against the City.

After the close of the plaintiff's case, the defense made motions for non-suit. The trial court granted the motion as to 10 officers, finding that the plaintiff had offered no evidence at all against them. The non-suit left only the City and four individual defendants: Officers Maiorana, Solis, and Gibson, and Lieutenant Perryman.

At the close of all the evidence, the parties agreed on the jury instructions. Specifically, both sides agreed and the jury was instructed that in the language of BAJI 11.51, that is, that the City could be liable only if one of its employees had been negligent.[2] There had been no evidence, and therefore no instruction, on the City's independent liability.

The jury was asked to render a special verdict. The special verdict form, with the jury's marks under the "yes" and "no" columns, read in pertinent part as follows:

"We, the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

"**Question No. 1:** Were any of the below listed Defendants negligent?

"Answer "yes" or "no" after the name of each defendant.

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[2] The court's instruction was: "The plaintiff, Kenneth Gilbert, seeks to recover damages from a public entity based upon a claim of wrongful conduct by an employee of the public entity. The essential elements of such claim are, one, that the Salinas Police Lieutenant Steven Perryman and Salinas Police Officers Vincent Maiorana, Jeffrey Gibson, and Ono Solis were employees of the City of Salinas; two, that such employees while acting in the scope of employment engaged in wrongful conduct, namely negligence; three, that the wrongful conduct of the employees caused plaintiff to suffer injury, damage, loss, or harm; four, the employees would be personally liable. An employee would be personally liable for his or her wrongful conduct unless the act or omission was the result of discretion vested in the employee."

"Answer:	YES	NO
"Defendant CITY OF SALINAS	X	_____
"Defendant STEVEN PERRYMAN	____	X
"Defendant VINCENT MAIORANA	____	X
"Defendant JEFFREY GIBSON	____	X
"Defendant ONO SOLIS	____	X"

The second question was in the same format and asked the jury whether the negligence of any of the defendants was a cause of injury to the plaintiff. The jury marked "yes" for the City, and "no" for each of the individuals.

The trial court immediately noted that the verdict was not consistent with the instructions. The defense urged the trial court to give the jury the opportunity to correct the verdict in light of BAJI No. 11.51. Plaintiff's counsel objected to that strategy and suggested filing motions for JNOV. Defense counsel acknowledged that the regular procedure would have been to have the motions "later on." Ultimately the parties agreed that they would dismiss the jury and each would make motions for JNOV. Plaintiff and the City filed cross motions for JNOV and plaintiff also filed a new trial motion. The City prevailed. Plaintiff appeals only from the judgment.

DISCUSSION

1. Plaintiff is estopped from contesting the trial court's power to rule on the City's JNOV motion.

The plaintiff argues that the trial court did not have jurisdiction to rule on the City's motion for JNOV because the motion was premature. We agree that the applicable statutes do not authorize a motion for JNOV where there remains any issue to be tried, but since the plaintiff agreed to the procedure, he cannot claim it as error.

The procedures for new trial and JNOV motions are synchronized by statute. A JNOV motion must be made within the period allowed for a new trial motion.

(Code Civ. Proc., §§ 629, 659.)[3] A new trial motion cannot be made until after a decision is rendered on all the issues in the case. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 460; § 656.) It follows that in a bifurcated case neither a new trial motion nor a motion for JNOV may be made until a decision has been rendered on both liability and damages. (*Meyser v. American Bldg. Maintenance, Inc*. (1978) 85 Cal.App.3d 933, 937.) However, the steps in any litigation may usually be modified by stipulation of the parties. (§ 283.) Therefore, the parties may modify the procedure prescribed by section 656 by agreeing to a new trial (or motion for JNOV) before the entire case is decided. A party who has consented to modify the procedure in that way is estopped from challenging the modification on appeal. (*City of Los Angeles v. Cole* (1946) 28 Cal.2d 509, 515 (*Cole*), overruled on other grounds in *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672.) The issue is not one of subject matter jurisdiction, as plaintiff initially suggested. The trial court has unquestioned subject matter jurisdiction in such circumstances. (*Cole*, *supra*, 28 Cal.2d at p. 515.)

In his opening brief plaintiff did not describe the parties' stipulation concerning the JNOV motions, but argued only that under the statutes the trial court did not have jurisdiction to rule on the motion. He did note that subject matter jurisdiction could not be conferred by stipulation. But as we have explained, subject matter jurisdiction is not an issue. In his reply, plaintiff acknowledges the stipulation and concedes that *Cole* would be controlling if the stipulation were valid. But now plaintiff contends that the stipulation is a nullity because the alternative would have been worse for him. He claims that he had no choice but to agree to the modified procedure because he presumes that judgment would have been for the defense if the jury had been permitted to correct its verdict. We are not persuaded. We cannot ignore an agreement simply because it was in

[3] Hereafter, all undesignated statutory references are to the Code of Civil Procedure.

the party's interest to consent to it. That is why people make agreements. Plaintiff expressly consented to allow the defense to file a motion for JNOV before all issues had been decided. Therefore, plaintiff is estopped from challenging the trial court's power to rule on that motion.

2. The trial court did not abuse its discretion in ruling on plaintiff's evidence.

Plaintiff's complaint was drafted as a single cause of action for negligence. However, plaintiff also alleged in his complaint that the search warrant had been "applied for using false information and the subsequent search was illegal." In response to the defense in limine motion, and in spite of plaintiff's vigorous argument to the contrary, the trial court determined that the issue to be tried was the reasonableness of the officers' conduct in executing the warrant, not the validity of the warrant. Accordingly, the trial court ruled that evidence of the alleged misrepresentations in the affidavit of probable cause for the warrant was not admissible. Plaintiff argues on appeal that the trial court erred in excluding this evidence.

The search warrant had been issued following a police investigation of Shirley Kline's son, Gerrad Kline. During that investigation it was determined that Gerrad Kline, a convicted felon, might have been storing guns at his mother's house. His possession of firearms would have been a violation of his probation. Officer Jeffrey Gibson prepared the affidavit of probable cause using information provided by a law enforcement database and interviews conducted by other officers. In his affidavit Officer Gibson stated that Ms. Kline had told investigators that she had a number of weapons that belonged to her son. Ms. Kline claimed she told them the guns did not belong to her son, but that they were hers.[4]

[4] Approximately 49 guns were ultimately seized in the search, a large number of which had been listed in the affidavit, including an AK47 assault rifle, four Uzi's, and various other handguns. Gerrad was found in violation of his probation and Ms. Kline pleaded no contest to possession of an illegal shotgun.

Contrary to plaintiff's argument on appeal, the trial court's ruling was not stated "with finality." The trial court specifically left open the possibility that the ruling was subject to change, depending on how the evidence came in during the trial. But we can find no attempt by the plaintiff during trial to offer evidence of misrepresentations that was excluded. Plaintiff argues that he cannot say exactly what evidence he was prevented from admitting since the excluded evidence does not appear in the record. That may be so, but we cannot pass upon a claim of error unless the error is somehow revealed in the record. (*Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 72.) If plaintiff had evidence he wanted to admit, it was incumbent upon him to make a record to preserve the issue for our review. (*Ibid.*)

What the record does reveal on this issue is that evidence of misrepresentation actually was admitted, without objection and apparently without limitation. Plaintiff's counsel freely questioned Officer Gibson and Ms. Kline on the representations made in the affidavit, and the affidavit itself was admitted into evidence. Because plaintiff made no record of evidence he claims was excluded and because he actually was permitted to offer the type of evidence he claims was excluded, we find plaintiff's contention on this point to be entirely without merit.

3. The trial court correctly granted the defendants' motion for JNOV.

The trial court granted the City's motion for JNOV, finding that the jury's verdict against the City was unsupported by the evidence and fatally inconsistent with its verdict in favor of the individual police officers. On appeal, plaintiff argues that the verdict was not inconsistent because the jury could have found that an unidentified employee of the City negligently caused the defendant's injuries, or that one of the four named defendants actually inflicted the injury but the jury could not determine which one. We agree with the trial court that there is no evidence to support such findings.

Plaintiff's claim against the City went to the jury on a theory of respondeat superior.[5] The long-standing rule is that a judgment favorable to an employee bars a respondeat superior action against the employer. (*Freeman v. Churchill* (1947) 30 Cal.2d 453, 461; Gov. Code, § 815.2.) Therefore, if the employee defendants were not negligent, this general rule would dictate that the City could not be liable either.

The form of the verdict in this case was intended to be a special verdict. "[A] special verdict presents to the jury each ultimate fact in the case. The jury must resolve all of the ultimate facts presented to it in the special verdict, so that 'nothing shall remain to the court but to draw from them conclusions of law.' (Code Civ. Proc., § 624.)" (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 854-855.) However, since the City's liability was derivative only, the jury's conclusion as to it was itself a conclusion of law. As a result, the verdict with which we are presented is effectively a general verdict against the City, with special verdicts as to each of the individual defendants, and we will treat it as such. "The first principle of inconsistent general and special verdicts is that they must be harmonized if there is any 'possibility of reconciliation under any possible application of the evidence and instructions. If any conclusions could be drawn thereunder which would explain the apparent conflict, the jury will be deemed to have drawn them.' " (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1183, quoting *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 540-541, overruled on other grounds in *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 580.) If we cannot reconcile them, the special verdicts control and judgment consistent with the special verdicts is required. (§ 625.)

[5] In his reply brief plaintiff suggests that the City could also be liable if there was an independent basis for liability. He does not identify any independent basis, nor can we find one in the record. We thus do not consider this portion of his argument. (*Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 619, fn. 2.)

In reviewing an order granting a JNOV we "view the evidence in the light most favorable to the party who obtained the verdict and against the party to whom the judgment notwithstanding the verdict was awarded. [Citations.] In other words, we apply the substantial evidence test to the jury verdict, ignoring the judgment." (*Hasson v. Ford Motor Co., supra*, 19 Cal.3d at p. 546.) Although we draw all inferences and resolve all conflicts in favor of the jury's decision, we cannot defer entirely to that decision. Evidence in support of the decision must be " 'reasonable in nature, credible, and of solid value.' " (*Beck Development Co. v. Southern Pacific Transportation Co*. (1996) 44 Cal.App.4th 1160, 1204.) When the jury rejects the testimony of a witness, that rejection removes the testimony from evidence we have to consider. However, once the jury rejects the testimony of one witness, it is not entitled to adopt an alternative version of the facts which otherwise lacks evidentiary support. (*Id.* at p. 1205.)

In an attempt to reconcile the verdicts plaintiff cites a series of cases in which an employer was found liable when the employee was not. These cases are all factually distinguishable from the instant matter. In *Wills v. J. J. Newberry Co*. (1941) 43 Cal.App.2d 595, a slip and fall case, the evidence disclosed that several unnamed sales clerks were aware of the hazard on the floor but failed to correct it. (*Id.* at p. 602.) In *Timbrell v. Suburban Hospital, Inc.* (1935) 4 Cal.2d 68 the plaintiff was injured while unconscious. (*Id.* at p. 70.) In *Stefanuto v. Market St. Ry. Co.* (1938) 24 Cal.App.2d 565 the appellate court determined, without discussion, that the jury's implied conclusion (that some agent other than the named individual was negligent) was "supported by the evidence." (*Id*. at p. 566.) And, in *Perez v. City of Huntington Park* (1992) 7 Cal.App.4th 817 the trial court, as finder of fact, determined that two out of a group of three or four employees actually did strike plaintiff. Because the trial court could not determine with specificity which of the two had struck him, judgment was entered in favor of the employees, but against their employer. (*Id.* p. 819.)

In each of the preceding cases, there was evidence that some employee other than the named defendant had caused the injury and that the plaintiff could have been mistaken or entirely unable to identify who that was. That is not the case here. There was some testimony that ski masks had obscured the officers' faces when they entered the residence, and that the plaintiff could not see his assailant while he was face down on the floor. But on the crucial issue of who actually laid hands on the plaintiff's person, the plaintiff positively identified Officer Maiorana as the one who hurt him. For example, on direct examination the plaintiff testified:

"Q. Did you ever recognize the officer who had his foot in your back?

"A. Yes, I did.

"Q. And who do you identify that officer to be?

"A. Officer Vincent Moreno (phonetic).

"Q. Is he the same officer we deposed not too long ago?

"A. Yes, he is.

"Q. How did you make that identification?

"A. By visual contact.

"Q. Was that at the scene at the time?

"A. Yes, it was.

"Q. And when did you next see Officer Moreno? [*sic*]

"A. After the accident or –

"Q. Yeah, after the accident.

"A. Once he got off of me. I was able to turn around and [*sic*] time enough to see him walking around the love seat where I was originally sitting and he exposed his head and he took the gear off of his head.

"Q. So you got a good look at his face?

"A. Yes, I did."

On cross-examination the plaintiff also identified Officer Maiorana:

"Q. Did you have any other abrasions or bruises or anything?

"A. In my back there was.

"Q. And was that bruise caused by anybody at the incident?

"A. Yes, it was.

"Q. Who?

"A. It was caused from Officer Moreno [*sic*] from putting his foot into my back."

And, plaintiff confirmed that the person that had the foot in his back was the same person who had thrown him over the coffee table:

"Q. And you testified the guy that threw you over that table put his foot in your back and he put a gun in the back of your head, correct?

"A. Yes, that's correct."

The only evidence that anyone other than Officer Maiorana could have caused plaintiff's injury is plaintiff's acknowledgment that a second officer may have participated in throwing him over the coffee table. Two officers held his shoulders down, but plaintiff denied that they injured him. No other officers had any physical contact with him.

This evidence does not reasonably permit the inference that plaintiff misidentified Officer Maiorana. And, all of plaintiff's allegations of wrongful conduct on the part of any of the other officers were related to the conduct of Officer Maiorana. That is, plaintiff argued that he was essentially being held hostage until the guns were found, and that the other officers should have put a stop to the detention. But if the jury could not find that defendant Maiorana was the negligent cause of his injury, it cannot rationally or logically have found that any of the other employees, named or unnamed, actually caused it either.

By rejecting plaintiff's claims against the four individual defendants, the jury removed any foundation for a verdict against the City. Therefore, the verdict cannot stand, and the trial court properly entered judgment notwithstanding that verdict.

MOTION FOR SANCTIONS

In a separate motion, the City contends that plaintiff should be required to pay its attorneys fees and costs on appeal as a sanction for a frivolous appeal and for plaintiff's having ignored the stipulation that lead to the JNOV motions, and misrepresented the trial court's ruling on the evidence. A party may seek sanctions for an unreasonable infraction of the rules governing appeals. In addition, the reviewing court is authorized to impose sanctions for an appellant's misconduct, or for a frivolous appeal. (§ 907; Cal. Rules of Court, rule 26(a).)

Section 907 provides, "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." California Rules of Court, rule 26(a) provides in pertinent part, "If the appeal is frivolous or taken solely for the purpose of delay . . . the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require."

The Supreme Court in the case of *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 set forth two standards, subjective and objective, for determining whether an appeal is frivolous. (*Id*. at p. 649.) Under a subjective standard, the court assesses the motives and good faith of the party and the party's attorney. (*Ibid*.) Under the objective standard, the court looks at the merits of the appeal and determines whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous. (*Ibid*.) The court concluded "an appeal should be held to be frivolous only when it is prosecuted for an improper motive — to harass the respondent or delay the effect of an adverse judgment — or when it indisputably has no merit — when any

reasonable attorney would agree that the appeal is totally and completely without merit." (*Id*. at p. 650.)

"Courts have struggled to apply Code of Civil Procedure section 907. [Citation.] On the one hand, the statute should be used to compensate for a party's egregious behavior, and to deter abuse of the court system and the appellate process. [Citations.] On the other hand, sanctions should not be awarded simply because an appeal is without merit. Indiscriminate application of section 907 could deter attorneys from vigorously representing their clients, and deter parties from pursuing legitimate appeals." (*Computer Prepared Accounts, Inc. v. Katz* (1991) 235 Cal.App.3d 428, 434.)

We do not condone plaintiff's failure to describe the stipulation to this court in his opening brief. The stipulation was controlling and plaintiff should have brought it to our attention at the outset. However, plaintiff does make an oblique reference to it in his opening brief when he argues that subject matter jurisdiction cannot be conferred by stipulation. If subject matter jurisdiction had been the issue, the stipulation would not have been relevant. Plaintiff explains in his reply that is why he omitted mention of it initially, and we have no reason to reject his explanation.

We do find that plaintiff misrepresented that the trial court had ruled "with finality" on the evidentiary issue, and that the argument, made without any record of evidence that was excluded, was objectively frivolous. Any reasonable attorney would agree that an appeal of an issue without a record is utterly meritless. However, we do not consider that this issue was such a substantial part of the appeal that it warrants sanctions on its own. (See, *Maple Properties v. Harris* (1984) 158 Cal.App.3d 997.)

The final question raised by the appeal comes perilously close to being frivolous. But " 'the borderline between a frivolous appeal and one which simply has no merit is vague indeed . . . . The difficulty of drawing the line simply points up an essential corollary to the power to dismiss frivolous appeals: that in all but the clearest cases it should not be used.' [Citation.]" (*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at

p. 650.) We use the power to impose sanctions for a frivolous appeal "sparingly to deter only the most egregious conduct" (*id*. at p. 651). We cannot say that plaintiff's position on the jury's verdict was so completely untenable or argued in such bad faith that it presents to us the clearest case for sanctions.

Defendant's motion for sanctions is denied.

DISPOSITION

The judgment is affirmed. Defendant shall be entitled to its costs on appeal.

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Premo, Acting P.J.

WE CONCUR:

_____

Elia, J.

_____

Mihara, J.